STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

JOSEFINA DONAHUE	)	
	)	
VS.	)	W.C.C. 02-04486
	)	
ROSS SIMONS, INC.	)	

DECISION OF THE APPELLATE DIVISION

BERTNESS. J. This matter came on for hearing before the Appellate Division on the petitioner/employee's appeal from an adverse decision and decree rendered by the trial court on November 17, 2003. The employee filed a petition to review contesting the discontinuation of her weekly benefits pursuant to R.I.G.L. § 28-33-18(d) on the ground that her injuries are a material hindrance to obtaining employment suitable to her limitations. The trial judge denied the petition, finding that the employee failed to prove that her injuries constituted a material hindrance to obtaining suitable employment.

On appeal, the employee argues that the trial judge used an erroneous legal standard of "manifest injustice," rather the appropriate "material hindrance" standard. We agree.

Employees who are partially disabled are entitled to receive a maximum of three hundred and twelve (312) weeks of indemnity benefits while they remain partially incapacitated. There are two (2) ways that employees can continue to receive indemnity benefits after the three hundred and twelve (312) week cutoff. First, pursuant to R.I.G.L. §§ 28-33-18(d) and 28-33-18.3, an employee can prove "that his or her partial incapacity poses a material hindrance to

obtaining employment suitable to his or her limitation…." R.I.G.L. § 28-33-18.3(a)(1). Rhode Island General Laws § 28-33-18(d) provides as follows:

> "In the event partial compensation is paid, in no case shall the period covered by the compensation be greater than three hundred and twelve (312) weeks. In the event that compensation for partial disability is paid under this section for a period of three hundred and twelve (312) weeks, the employee's right to continuing weekly compensation benefits shall be determined pursuant to the terms of § 28-33-18.3. At least twenty-six (26) weeks prior to the expiration of the period, the employer or insurer shall notify the employee and the director of its intention to terminate benefits at the expiration of three hundred and twelve (312) weeks and advise the employee of the right to apply for a continuation of benefits under the terms of § 28-33-18.3. In the event that the employer or insurer fails to notify the employee and the director as prescribed, the employer or insurer shall continue to pay benefits to the employee for a period equal to twenty-six (26) weeks after the date the notice is served on the employee and the director."

An employee's right to continuing weekly benefits is determined pursuant to R.I.G.L. § 28-33-18.3. That section provides in pertinent part as follows:

> "(a)(1) For all injuries occurring on or after September 1, 1990, in those cases where the employee has received a notice of intention to terminate partial incapacity benefits pursuant to § 28-33-18, the employee or his or her duly authorized representative may file with the workers' compensation court a petition for continuation of benefits on forms prescribed by the workers' compensation court. In any proceeding before the workers' compensation court on a petition for continuation of partial incapacity benefits, where the employee demonstrates by a fair preponderance of the evidence that his or her partial incapacity poses a material hindrance to obtaining employment suitable to his or her limitation, partial incapacity benefits shall continue. For injuries on and after July 1, 2001, "material hindrance" is defined to include only compensable injuries causing a greater than sixty-five percent (65%) degree of functional impairment and/or disability. Any period of time for which the employee has received benefits for total incapacity shall not be included in the calculation of the three hundred and twelve (312) week period.
>
> (2) The provisions of this subsection apply to all injuries from Sept. 1, 1990, to July 1, 2001." (emphasis added).

Employees who satisfy the requirements of R.I.G.L. §§ 28-33-18(d) and 28-33-18.3, continue to receive partial disability benefits beyond the three hundred and twelve (312) week cutoff. Lombardo v. Atkinson-Kiewit, 746 A.2d 679, 689 (R.I. 2000). Employees

receiving benefits pursuant to these statutes are considered partially disabled and do not receive dependency benefits. Employees do, however, receive an annual cost of living increase pursuant to R.I.G.L. § 28-33-18.3(b). In addition, employees receiving benefits pursuant to these statutes may not commute their claims. R.I.G.L. § 28-33-18.3(c).

The second way that employees may continue receiving workers' compensation benefits past the three hundred and twelve (312) week gate is by proving that "manifest injustice" will result if benefits are discontinued. R.I.G.L. § 28-33-17(b)(2). Under R.I.G.L. § 28-33-17(b)(2), an employee may establish a finding of "total disability" if certain requirements are satisfied:

> "In all other cases, total disability shall be determined only if, as a result of the injury, the employee is physically unable to earn any wages in any employment; provided, that in cases where manifest injustice would otherwise result, total disability shall be determined when an employee proves, taking into account the employee's age, education, background, abilities, and training, that he or she is unable on account of his or her compensable injury to perform his or her regular job and is unable to perform any alternative employment. The court may deny total disability under this subsection without requiring the employer to identify particular alternative employment." (emphasis added)

This manifest injustice standard is a retooling of the so-called "odd lot doctrine," which had been developed by case law. When employees can prove manifest injustice pursuant to the statute, they are afforded all of the benefits afforded to other employees who are considered "totally disabled." Therefore, employees are entitled to receive dependency benefits as well as annual cost of living increases. R.I.G.L. § 28-33-17(c)(1) et seq. Employees receiving benefits for total incapacity by satisfying the manifest injustice standard may commute their cases pursuant to §28-33-25.

The trial judge in the instant petition utilized the manifest injustice standard set forth in R.I.G.L. § 28-33-17(b)(2) and as discussed by the Rhode Island Supreme Court in Lombardo v.

Atkinson Kiewit, 746 A.2d 679 (R.I. 2000). Specifically, the trial judge stated in his bench decision as follows:

> ". . . I intend later on in the decision to quote from an opinion written by Mr. Justice Flanders in 2000 which sets out the standards that I believe I have to use in order to resolve the issue presented to me by way of this petition." (Tr. p. 79)

The trial judge went on to state as follows:

> "Let's first set out what I think is the legal standard that Mrs. Donahue must meet, and then I want to get into a comparison of the evidence that's been presented in this case as compared to the standard. Mr. Justice Flanders wrote an opinion in calendar year 2000 in the case of Alfred Lombardo v. Atkinson-Kiewit, 746 A.2d, (sic) 679 which goes into a rather lengthy and a very complete discussion of odd lot and manifest injustice which is the particular term that we're dealing with in the case that's before the court because as I indicated earlier 28-33-18.3 indicates that in any proceeding before the court where the employee demonstrates his or her partial incapacity poses a material hindrance to obtaining employment, benefits shall continue." (Tr. p. 93) (emphasis added)

Lombardo involved an employee's petition to review seeking total disability benefits based on R.I.G.L. § 28-33-17(b)(2), the manifest injustice/odd lot standard. The instant petition seeks benefits for continuing partial disability pursuant to R.I.G.L. § 28-33-18(d), the material hindrance standard. Although the trial judge concluded that the employee failed to prove that she suffers from a material hindrance to obtaining suitable employment, it appears that he reached this result using the manifest injustice standard.

The Lombardo decision distinguished the difference between seeking continuing partial disability benefits and total disability benefits. Lombardo states as follows:

> "We also note that the provisions of § 28-33-18.3 (allowing for the continuation of partial-disability benefits beyond the 312 week cutoff of benefits per § 28-33-18(d) are available to a partially disabled employee like this petitioner if he or she can show "that his or her partial incapacity poses a material hindrance to obtaining employment suitable to his or her limitation." The existence of this provision, however, serves to underscore a key distinction drawn by the WCA between qualifying for continued-partial-disability benefits and qualifying for total-disability benefits via proof of odd-lot status: namely, to qualify under the latter WCA provisions, it is not enough that partially disabled employees are able

> to establish that their disability poses a material hindrance to obtaining employment suitable to their limitations. Rather, to qualify for total, as opposed to continued-partial-disability benefits, partially disabled employees must clear an even higher statutory hurdle: they must show not just that their partial incapacity materially hinders them in their efforts to obtain suitable-alternative employment, but also that they are actually unable to perform their regular job and any alternative employment, such that it would be manifestly unjust to deny them total-disability benefits." Lombardo at 689.

Lombardo emphasizes that employees seeking to establish total disability under the manifest injustice standard "must clear an even higher statutory hurdle," as compared with those employees seeking to establish partial disability pursuant to the material hindrance standard. Since it appears that the trial justice in the instant petition applied the manifest injustice standard rather than the lesser material hindrance standard, we remand the case to the trial judge to reconsider the evidence in accordance with the appropriate legal standard.

In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, a final decree, a copy of which is enclosed, shall be entered on

Olsson and Sowa, JJ. concur.

ENTER:

_____
Olsson, J.

_____
Bertness, J.

_____
Sowa, J.

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ORDER OF REMAND OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeal of the petitioner/employee from a decree entered on November 17, 2003, and upon consideration thereof, the appeal is granted and it is:

ORDERED, ADJUDGED, AND DECREED:

1. That the decree of the trial judge entered on November 17, 2003 is hereby vacated.

2. That the matter is remanded to the trial judge for reconsideration of the evidence in accordance with the decision of the Appellate Division.

3. That the respondent/employer shall reimburse the employee's counsel the sum of Two Hundred Fifty and 00/100 ($250.00) Dollars for the cost of filing the claim of appeal and obtaining a transcript of the trial proceedings.

4. That the respondent/employer shall pay a counsel fee to Ronald L. Bonin, Esq., attorney for the employee, in the amount of One Thousand Five Hundred and 00/100 ($1,500.00) Dollars for the successful prosecution of the employee's appeal.

Entered as an Order of the Appellate Division this day of

BY ORDER:

_____

ENTER:

_____
Olsson, J.

_____
Bertness, J.

_____
Sowa, J.

I hereby certify that copies were mailed to Ronald L. Bonin, Esq., and Francis T. Connor, Esq., on

_____